IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Writ Petition No.2510 of 2006

Aderabad Co-operative Housing Society Limited. .. .. Petitioners

Versus

1. Div. Jt. Registrar, Co-operative Societies, Mumbai.
2. The Dy. Registrar, Co-operative Societies, Mumbai.
3. Mrs.Zinia Lawyer, Mumbai.
4. Mrs.Bakhtawar Bezan Chenoy, Mumbai. .. Respondents

Mrs.Rita Bhatia for Petitioners.

Mr.Jai Chinai with Mr.Sanjay Jain and Mr.Rajesh Rathod i/by M/s.Bilawala & Co. for Respondent Nos.3 & 4.

Mr.K.R. Belosay, AGP for Respondent Nos.1 & 2.

CORAM : SMT.ROSHAN DALVI, J.

Date of reserving the judgment : 24.7.2007

Date of pronouncing the judgment : 31.7.2007

JUDGMENT :

1. The Petitioners have applied for issue of a writ of certiorari in respect of the order of the Deputy Joint Registrar, Co-operative Societies, Mumbai-Respondent No.1,

dated 16.5.2006. The order is in respect of expulsion of Respondent Nos.3 and 4 as nominal members of the Petitioner-Society. The expulsion decided in the Special General Body meeting of the Petitioners was approved by the Deputy Registrar, Co-operative Societies. The 1st Respondent, under the impugned order, has set aside the said order and refused to approve the expulsion of Respondent Nos.3 and 4 under Section 35 of the Maharashtra Co-operative Societies Act, 1960 (MCS Act) read with Rules 28 and 29 of the Maharashtra Co-operative Societies Rules (MCS Rules).

2. The Petitioner Society's building has been constructed by one Bakhtawar Construction Company as the builder and developer under an Agreement dated 31.3.1975 executed by the developer with the owners of the land and the supplemental Agreement dated 14.8.1995 similarly executed. The developer entered into agreements with the flat purchasers of the Petitioner-Society. The drafts of those agreements are stated to have been approved by the owners.

3. Clause 41 of the said Agreement relates to the intention of the builders to sell the parapet wall of the terrace and blank walls on the external periphery of the buildings, referred to as the premises/space for the purpose of the advertisement by way of hoardings and display of neon lights thereon. The sale was to be to the members who would be admitted as nominal members of the Society. Pursuant to the said clause, the Petitioners are deemed to have had knowledge of the user of the said premises as shown therein. Respondent Nos.3 and 4 were made nominal members of such premises/space.

4. This was pursuant to 2 separate Agreements entered into by the builder and developer with Respondent Nos.3 and 4 dated 17.1.1979 and 8.1.1980 prior to the registration of the Society.

5. The Petitioner-Society came to be registered on 19.4.1980. Respondent Nos.3 and 4 were admitted as nominal members of the Society in the first Annual General Meeting of the Society held on 9.10.1980.

6. As far back as on 23.2.1982, the Petitioners had sent a notice to Respondent Nos.3 and 4 to stop using the blank walls of the building for putting up hoardings.

7. They have filed a Suit against the owners, the builders/developers as well as Respondent Nos.3 and 4 in this Court being Suit No.514 of 1984 for declaration that Clause-41 of their Agreements for purchase of flats was void and in excess of the authority conferred upon the builder/developer by the owners of the land and that the nominal membership of Respondent Nos.3 and 4 herein was obtained by fraud and misrepresentation and was not binding upon the Petitioners and for other reliefs.

8. The dispute with regard to the utilization of the said premises/space for the purpose of putting up hoardings is, therefore, two decades old. The contention that the space was so given and Respondent Nos.3 and 4 were made nominal members thereby has been agitated since the last two decades. The knowledge of the rights claimed by Respondent Nos.3 and 4 as per Clause-41 of the Agreement

of flats purchase to the members of the Petitioners which are disputed by the Petitioners has also been for the last two decades.

9. It has been contended by the Petitioners in the aforesaid Suit as well as in this Petition that an undertaking came to be filed by the developer/builder that they would surrender, inter alia, the right on the parapet wall of terrace and blank walls on the external periphery of the Petitioners' building. It is also contended by the Petitioners that such undertaking came to be filed by them with the BMC. A copy of the undertaking, Exhibit-A to the Petition, is shown to be dated 18.12.1979. It is not mentioned or shown when the same is filed.

10. Counsel on behalf of Respondent No.4 has tendered a xerox copy of the letter dated 27.2.1980 of the Registrar of Co-operative Societies calling upon the builder/developer to file such an undertaking. That letter is not referred to or annexed in the Affidavit in reply of Respondent Nos.3 and 4. It is contended that the letter shows that no such

undertaking was filed at least until 27.2.1980.

11. It is, however, seen that the premises/space has been all along used by Respondent Nos.3 and 4 for exhibiting hoardings. They claim their rights as nominal members under Clause-41 of the aforesaid Agreements. In or about October 2004, the Petitioners, after a lull of 20 years, sought to issue a show cause notice upon Respondent Nos.3 and 4 why their nominal membership obtained by them by misrepresentation and which was contrary to law, should not be revoked. The Petitioners contend that no rights were created in the builder/developer to use the blank walls of the Petitioner Society's building for putting up hoardings.

12. Following the issue of the notice to show cause, the Petitioners issued a Notice under Section 35 of the MCS Act read with Rules 28 and 29 of the MCS Rules upon Respondent Nos.3 and 4 on 27.12.2004 to show cause why their membership should not be cancelled in a meeting to be held in the first week of February 2005 (a little more than a month after the notice was issued). The notice dated

27.12.2004, Exhibit-G to the Petition, sets out the false representations and misleading statements made by the builder/developer and the lack of permission of the owners in using open facade wall for putting up the hoardings. It relates to the Suit filed in 1984 and sets out the unwarranted extent of about Rs.11 Lacs spent from the contribution made by the members of the Petitioner-Society and the further harassment suffered by the Petitioners with various government offices and local bodies in respect of the hoardings. It also sets out the undertaking dated 18.12.1979 of the builder/developer surrendering his rights in the parapet walls and the blank walls on the external periphery of the Petitioners' building and calls upon Respondent Nos.3 and 4 to show cause within 30 days why the resolution (set out in the said notice) for expelling them as nominal members of the Society should not be passed in the special general body meeting to be convened in the first week of February 2005, the date of which would be intimated to them.

13. On 30th January 2005 they sent a notice of the special body meeting setting out, inter alia, the said matter as one of the agendas of the meeting to be held on 6.2.2005.

14. It is contended on behalf of the Petitioners that the Notice dated 27th December 2004 is in consonance with Section 35 read with Rules 28 and 29 of the aforesaid Act and the Rules and that the precise date of the meeting has been informed to Respondent Nos.3 and 4 so that the provisions of the aforesaid section and rules are strictly complied with.

15. Though Respondent Nos.3 and 4 are stated to have replied to the Notice on 5.2.2005 (no such reply is referred to or shown in the Petition), they failed to attend the meeting and a resolution for their expulsion came to be passed unanimously. This came to be filed in the office of the Registrar of Co-operative Societies and came to be approved by the said office. In Appeal, Respondent No.1, as the Appellate Authority under the MCS Act, set aside the said order which is challenged in the Petition.

16. It is contended on behalf of Respondent Nos.3 and 4 that the expulsion of the members entails severe consequences and hence, Section 35 of the MCS Act and Rules 28 and 29 of the MCS Rules must be strictly complied with, failure of which must result in the expulsion being vitiated. There is no doubt that the strict compliance of the said section and the rules is required as has been held in various judgments of this Court.

17. It is seen that if the Notice dated 27.12.2004, Exhibit-G to the Petition, and the Notice dated 30.1.2005, Exhibit G-1 to the Petition, are read together, the period of time allowed under Rules 28 and 29 of the MCS Rules would be complied with. It is contended on behalf of the Respondents that the notice of holding the meeting for expelling Respondent Nos.3 and 4 from the nominal membership of the Petitioner-Society is only the Notice dated 30.1.2005, Exhibit G-1 to the Petition. That is not the notice of a month required under the Rules and hence, the notice is bad and deserves to be set aside.

18. That is one of the reasons why the impugned order has set aside the order of the Deputy Registrar, Co-operative Societies dated 12.9.2005 also.

19. It is seen that the purpose of the notice to expel the members is of prime importance. Under Section 35(1) of the MCS Act, a resolution of not less than three-fourths of the members would be entitled to expel a member for acts which are detrimental to the interest and proper working of the Society. Such resolution is required to be passed upon giving opportunity to the Petitioner to represent his case to the General Body and becomes effective only after approval of the Registrar.

20. The Petitioners contend that the acts of Respondent Nos.3 and 4 are detrimental to the interest of the Society. For that reason, the Suit has been filed as far back as in 1984 upon the notice given to Respondent Nos.3 and 4 as far back as on 27.2.1982. The decision to take the action to expel Respondent Nos.3 and 4 from the membership of the Society for the same reason is, therefore, highly belated.

21. It is contended on behalf of the Petitioners that the notice has also been given for the damages suffered by the Petitioner-Society, which is to the tune of Rs.11 Lacs. Though the Notice dated 27.12.2004 mentions about the said damages, no particulars of the damages to the extent of Rs.11 Lacs or any such amount are given. None is mentioned in the resolution. Consequently, Respondent Nos.3 and 4 cannot be said to have been given any opportunity to represent their case with regard to the damages alleged to have been suffered by the Petitioner-Society.

22. Such is the Petitioners' case on merits.

23. Under Rule 28 of the MCS Rules, a persistent defaulter or a member who brings the Society into any disrepute or whose acts are detrimental to the interest and the proper working of the Society could be expelled.

24. Under Rule 29(1) of the MCS Rules, a notice of the resolution for expulsion of the member included in the agenda of the next general meeting is required to be given to

the member against whom the resolution for expulsion is proposed to be brought, calling upon him to be present at the general meeting which would be held not earlier than a month from the date of the notice to show cause against the expulsion. After hearing such member and considering his written representation, if any, the resolution could be passed by the general body of members.

25. Under Rule 29(2) of the MCS Rules, such resolution is required to be sent to the Registrar of Co-operative Societies for his approval and the Registrar is required to make such inquiries as he deems fit to grant his approval and communicate the same to the Society as well as the member. A reading of the aforesaid provisions shows that a case for expulsion of the member is required to be made out by the Society. This would include the case that the member's acts are detrimental to the interest of the Society. The precise procedure set out in Rule 29 is to be followed. It, therefore, entails :

(a) notice of the resolution to be given to the

member;

(b) the presence of the member at the meeting;

(c) holding of the meeting more than a month after the notice being received by the member;

(d) the right of the member to show cause against his/her expulsion;

(e) hearing of the member orally or by a written representation;

(f) general body of the Society to consider the resolution upon such hearing by 3/4th majority;

(g) sending of the resolution to the Registrar of Co-operative Societies.

The Registrar has to :

(a) make inquiries;

(b) give approval;

(c) communicate it to the Society as well as the member

The resolution becomes effective thereafter.

26. Reading of these provisions shows that the resolution has to be passed by the Society and considered on merits of each matter.

27. In the judgment of the Division Bench of this Court in the case of **K.V. Sundaram & anr. vs. Raj Rajeshwari Co-op. Housing Society Ltd. & ors. 1980 C.T.J. 130**, it has been that the Registrar must give a hearing to the member concerned for making inquiries and give an opportunity to him/her of representing his or her case under Rule 29(2) of the MCS Rules. It has been held in that judgment that an enquiry is not a mere mechanical, idle formality. Though on the face of it, it appears that it is a summary enquiry, having regard to the consequences that would follow the decision of the expulsion of a member, the Registrar is bound to apply his mind and consider also the validity of the resolution passed by the Society. Consequently, it is an enquiry which is a substitute for a Civil Court but only required to be agitated in the special forum created under Section 91 of the MCS Act, which grants the said forum special jurisdiction.

Hence, it is held that the Registrar must go into the merits of the particular case and not look simply at the formalities of procedure.

28. Similarly in the case of **Bhaskar Laxman Rane vs. Shri Gurudev Nityanand Co-operative Housing Society Ltd., Worli, Bombay & ors. 1998 (3) Mh.L.J. 127**, it has been held that merits of the case had to be considered by the Registrar against the member who is sought to be expelled. In that case certain concessions granted to the member prior to the notice for claiming certain amount from him were not considered. The Registrar mechanically considered the notice of the Society only claiming amounts from the member, for failure of payment of which he was sought to be expelled under Section 35 of the MCS Act. The approval granted by the Registrar was set aside on the ground that the member had a valid defence under earlier concessions granted to him and could not be expelled without considering those concessions.

29. It would have to be seen whether Respondent No.1 has

considered these aspects on merits in the impugned order. Para-10 of the order shows that the draft of the agreement of the flat purchasers was to be approved by the owners of the plot where the Petitioner-Society's building came to be constructed. It further shows that Respondent Nos.3 and 4 were admitted as nominal members in the first AGM of the Society held in the year 1980. It has also considered Clause-41 of the Agreements of purchase of flats by the Petitioners' members. It has further considered that the Municipal Corporation is separately assessing the hoardings for the last several years, bills of which are issued in the name of the owners and paid by Respondent Nos.3 and 4. Consequently, knowledge is imputed upon the owners as well as the flat purchasers of the continuous rights of Respondent Nos.3 and 4 since 1980.

30. On merits, it is seen that the case against Respondent Nos.3 and 4 raised by the Petitioner-Society has been essentially the same for the last 20 years. A Civil Suit is pending with regard to that dispute. The knowledge of the

admission of Respondent Nos.3 and 4 as nominal members and their rights under Clause-41 of the Agreement of purchase of flats must be imputed upon the Petitioners. The Petitioners also claim that the acts of Respondent Nos.3 and 4 are detrimental to the interest of the Society inasmuch as they have suffered damages, the particulars of which are not given. The merits of the Petitioners' case have been considered in the impugned order. The reasons for which the order of the Deputy Registrar is set aside and the expulsion of Respondent Nos.3 and 4 is not approved, are not perverse. The writ of certiorari claimed by the Petitioners, therefore, cannot be issued.

31. It has been argued on behalf of the Petitioners that Respondent Nos.3 and 4 cannot be nominal members as they would be members of parapet wall of terrace and the blank walls on the external periphery of the building. They contend that Respondent Nos.3 and 4 can be members only of a flat under Section 22 of the MCS Act read with Rule 17 Note (3) of the New Model Bye-laws, which the Petitioner-

Society have adopted. Note (3) shows that number of members in the society would be limited to the number of flats constructed in the building. Nevertheless, there is a provision for nominal, associate or sympathiser members under Section 24 of the MCS Act. Hence, Note (3) Rule 17 of the Bye-laws relates to the members under Rule 22, the nominal members being in addition thereto. In fact, it is, therefore, that the provision with regard to the builder/developer admitting nominal members in respect of the premises/space mentioned in Clause-41 of the aforesaid Agreements was allowed.

32. The Petitioners may be entitled to challenge the said clause against the builder/developer in the Suit filed by them. The Petitioners have not made out the case for expulsion of Respondent Nos.3 and 4 as members on that ground.

33. The case of the Petitioners against Respondent Nos.3 and 4, who have been made nominal members pursuant to the Agreements entered into by them on 17.1.1979 and

8.1.1980 prior to the registration of the Petitioner-Society and prior to any undertaking submitted by the builder for surrendering his rights to the premises/space, for which they were made nominal members of the parapet wall of terrace and blank walls of the building cannot be challenged. Similarly, in view of the fact that Respondent Nos.3 and 4 were admitted as nominal members in the first AGM of the Society, they cannot be expelled therefrom without any further sufficient reason showing how their acts are detrimental to the interest of the Society.

34. The case of misrepresentation, fraud or otherwise is not made out to merit their expulsion. Similarly the extent of damages suffered by their detrimental acts is not shown. The impugned order considers both these aspects.

35. Since a notice of expulsion entails drastic consequences the provisions of Rule 29 are held to be mandatory and a notice of less than one month under the said Rule is held liable to be set aside in the case of **Bhaskar Rane (*supra*)** as well as in the case of **Narayan Ramkrishna Embadwar vs.**

Assistant Registrar, Co-operative Societies, Yavatmal & other 1994 Mh.L.J. 822.

36. A reading of Rule 29 shows that the resolution incorporated in the agenda of the next general meeting is to be notified to the member proposed to be expelled. The agenda has not been shown in the Notice dated 27.12.2004, though it sets out the case of the Petitioner-Society against Respondent Nos.3 and 4 for their expulsion on merits. The agenda incorporating the resolution is served upon Respondent Nos.3 and 4 only on 30.1.2005. It cannot, therefore, be taken to be strict compliance of the notice contemplated under Section 35 of the MCS Act read with Rules 28 and 29 of the MCS Rules. Accordingly, in the impugned order, Respondent No.1 has correctly concluded that the said notice falls short of the statutory period.

37. It is further contended on behalf of Respondent Nos.3 and 4 that under Section 73 (1AB) of the MCS Act, the Committee members of the Petitioner-Society were required to execute a bond to the effect that they would be jointly and

severally responsible for all the decisions of the Committee and all the acts and omissions detrimental to the interest of the Society, failing which they would be deemed to have vacated their office as such members. It is contended that no such bond is executed and hence, the entire Committee vacated their office as members of the Committee and, therefore, also no resolution for expelling Respondent Nos.3 and 4 could have been passed.

38. In the case of **Assissi Co-operative Housing Society Limited & ors. vs. The State of Maharashtra & ors. Appeal No.683 of 2006 In Writ Petition No.501 of 2005**, it has been held that the provision under Section 73 (1AB) is mandatory, salutary and imperative and not directory since the section itself provides the consequences for its non-compliance.

39. It is, therefore, seen that whatever be the case of the Society against the builders, owners as also Respondent Nos.3 and 4 as the nominal members in the Suit filed by them, a case for the expulsion of Respondent Nos.3 and 4

pending that Suit and after 20 years of the filing of the Suit, without substantiating any case of damages has not been made out on merits or under the strict procedure required therefor.

40. The impugned order has considered the merits of the case as well as the length of service of the notice as per the procedure under Rule 29 of the MCS Rules read with Section 35 of the MCS Act. No case for issue of writ of certiorari is made out.

41. The Petition is accordingly, dismissed. Rule stands discharged. There shall be no order as to costs.

(ROSHAN DALVI, J.)